

Internal Revenue Service, Treasury

§ 1.1502-21T

§ 1.1502-21T(h)(8) as contained in 26 CFR part 1 in effect on January 1, 2006.

(9) [Reserved] For further guidance, see § 1.1502-21T(h)(9).

[T.D. 8823, 64 FR 36105, July 2, 1999]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 1.1502-21, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

§ 1.1502-21T Net operating losses (temporary).

(a) through (b)(3)(ii)(B) [Reserved] For further guidance, see § 1.1502-21(a) through (b)(3)(ii)(B).

(C) *Partial waiver of carryback period for an applicable consolidated net operating loss—(1) Application.* The acquiring group may make an election described in paragraph (b)(3)(ii)(C)(2) or (b)(3)(ii)(C)(3) of this section with respect to an acquired member or members only if it did not file a valid election described in § 1.1502-21(b)(3)(ii)(B) with respect to such acquired member or members on or before June 23, 2010.

(2) *Partial waiver of entire pre-acquisition carryback period.* If one or more members of a consolidated group become members of another consolidated group, then, with respect to the consolidated net operating loss arising in a taxable year ending after December 31, 2007, and beginning before January 1, 2010 (Applicable CNOL) for which the group has made an election pursuant to section 172(b)(1)(H), the acquiring group may make an irrevocable election to relinquish, for the part of the Applicable CNOL attributable to such member, the portion of the carryback period during which the corporation was a member of another group. This election could thus operate to relinquish carryback for up to five taxable years, including the Extended Carryback Period (as defined in paragraph (b)(3)(v) of this section). However, any other corporation joining the acquiring group that was affiliated with the member immediately before it joined the acquiring group must also be included in the waiver, and the conditions of this paragraph (b)(3)(ii)(C)(2) must be satisfied. The acquiring group cannot make the election described in this paragraph (b)(3)(ii)(C)(2) with respect to any particular portion of an

Applicable CNOL if any carryback is claimed, as provided in paragraph (b)(3)(ii)(C)(4) of this section, with respect to any such loss on a return or other filing by a group of which the acquired member was previously a member and such claim is filed on or before the date the election described in this paragraph (b)(3)(ii)(C)(2) is filed. The election must be made in a separate statement entitled “THIS IS AN ELECTION PURSUANT TO § 1.1502-21T(b)(3)(ii)(C)(2) TO WAIVE THE PRE-[insert the first day of the first taxable year for which the member (or members) was a member of the acquiring group] CARRYBACK PERIOD FOR THE CNOL ATTRIBUTABLE TO THE [insert taxable year of loss] TAXABLE YEAR OF [insert names and employer identification numbers of members].” Such statement must be filed as provided in paragraph (b)(3)(ii)(C)(5) of this section.

(3) *Partial waiver of pre-acquisition Extended Carryback Period.* If one or more members of a consolidated group become members of another consolidated group, then, with respect to the Applicable CNOL for which the acquiring group has made an election pursuant to section 172(b)(1)(H), the acquiring group may make an irrevocable election to relinquish, for the part of the Applicable CNOL attributable to such member, the portion of the Extended Carryback Period (as defined in paragraph (b)(3)(v) of this section) during which the corporation was a member of another group. This election could thus operate to relinquish carryback for up to three taxable years. However, any other corporation joining the acquiring group that was affiliated with the member immediately before it joined the acquiring group must also be included in the waiver, and the conditions of this paragraph (b)(3)(ii)(C)(3) must be satisfied. The acquiring group cannot make the election described in this paragraph (b)(3)(ii)(C)(3) with respect to any particular portion of an Applicable CNOL if a carryback to one or more taxable years that are prior to the taxable year that is two taxable years preceding the taxable year of the Applicable CNOL is claimed, as provided in paragraph (b)(3)(ii)(C)(4) of this section, with respect to any such

loss on a return or other filing by a group of which the acquired member was previously a member, and such claim is filed on or before the date the election described in this paragraph (b)(3)(ii)(C)(3) is filed. The election must be made in a separate statement entitled “THIS IS AN ELECTION PURSUANT TO § 1.1502-21T(b)(3)(ii)(C)(3) TO WAIVE THE PRE-[insert the first day of the first taxable year for which the member (or members) was a member of the acquiring group] EXTENDED CARRYBACK PERIOD FOR THE CNOL ATTRIBUTABLE TO THE [insert taxable year of losses] TAXABLE YEAR OF [insert names and employer identification numbers of members].” Such statement must be filed as provided in paragraph (b)(3)(ii)(C)(5) of this section.

(4) *Claim for a carryback.* For purposes of paragraphs (b)(3)(ii)(C)(2) and (b)(3)(ii)(C)(3) of this section, a carryback is claimed with respect to a net operating loss if there is a claim for refund, an amended return, an application for a tentative carryback adjustment, or any other filing that claims the benefit of the NOL or CNOL in a taxable year prior to the taxable year of the loss, whether or not subsequently revoked in favor of a claim based on an Extended Carryback Period provided under section 172(b)(1)(H).

(5) *Time and manner for filing statement.* A statement described in paragraph (b)(3)(ii)(C)(2) or (b)(3)(ii)(C)(3) of this section that relates to an Applicable CNOL shall be made by the due date (including extension of time) for filing the return for the taxpayer’s last taxable year beginning in 2009.

(6) *Example.* (i) *Waiver in case of pre-consolidation separate return years.* T was a separate corporation that was not part of a consolidated group, until December 31, 2004, when it was acquired by the X Group. On December 31, 2007, the X Group sold all of the stock of T to the P Group. P did not make the election described in § 1.1502-21(b)(3)(ii)(B) to relinquish, with respect to all CNOLs attributable to T, the portion of the carryback period for which T was a member of the X Group. In 2008, the P Group sustained a \$1,000 CNOL, \$600 of which was attributable to T under § 1.1502-21(b)(2)(iv)(A). P elected a Five-Year Carryback (as defined in paragraph (b)(3)(v) of this section) pursuant to section 172(b)(1)(H) with regard to the P Group’s 2008 CNOL, and the P Group elected, pursuant to paragraph (b)(3)(ii)(C)(2) of this section, to

waive the portion of the carryback period during which T was included in any other consolidated group. T’s fifth and fourth taxable years preceding the year of the loss were its 2003 and 2004 separate return years. Due to the P Group’s election pursuant to paragraph (b)(3)(ii)(C)(2) of this section, T’s allocable portion of the P Group’s 2008 CNOL will not be carried back to the years for which it was a member of the X Group. However, T’s allocable portion of the P Group’s 2008 CNOL will be carried back to T’s non-consolidated taxable years (2003 and 2004), subject to the limitation provided in section 172(b)(1)(H)(iv).

(ii) *Split-waiver election made.* The facts are the same as in paragraph (i) except that the group made the election described in § 1.1502-21(b)(3)(ii)(B) with regard to its acquisition of T in 2007. Due to the P Group’s election pursuant to § 1.1502-21(b)(3)(ii)(B), T’s allocable portion of the P Group’s 2008 CNOL will not be carried back to the years for which T was a member of the X Group. However, T’s allocable portion of the P Group’s 2008 CNOL will be carried back to T’s non-consolidated taxable years (2003 and 2004), subject to the limitation provided in section 172(b)(1)(H)(iv).

(b)(3)(iii) and (b)(3)(iv) [Reserved] For further guidance, see § 1.1502-21(b)(3)(iii) and (b)(3)(iv).

(v) *Extended Carryback Period under section 172(b)(1)(H).* Section 172(b)(1)(H) allows a taxpayer to elect to carry back a single net operating loss arising in a taxable year ending after December 31, 2007, and beginning before January 1, 2010 (Applicable NOL) to its third, fourth, or fifth taxable year preceding the taxable year of the loss (Extended Carryback Period). As contemplated by section 172(b)(1)(H), the designated taxable year within the Extended Carryback Period may be the fifth taxable year preceding the year of the loss (Five-Year Carryback), and section 172(b)(1)(H)(iv) limits the amount of the Applicable NOL that may be carried back to 50 percent of the taxpayer’s taxable income (computed without regard to any NOL deduction attributable to the loss year or any taxable year thereafter) for such fifth preceding taxable year. This paragraph (b)(3)(v) provides rules for computing the 50 percent limitation under section 172(b)(1)(H)(iv) where a Five-Year Carryback is made to a consolidated return year from any consolidated return year or separate return year.

(A) *Election—(1) In general.* Except as otherwise provided in this section, a consolidated group may elect an Extended Carryback Period pursuant to section 172(b)(1)(H) with regard to a consolidated net operating loss arising in a taxable year ending after December 31, 2007 and beginning before January 1, 2010 (Applicable CNOL). However, no election may be made under this paragraph for a taxpayer described in section 13(f) of the Worker, Homeownership, and Business Assistance Act of 2009, Public Law 111-92, 123 Stat. 2984 (November 6, 2009). The election pursuant to section 172(b)(1)(H) applies to the entire Applicable CNOL, except as otherwise provided in paragraph (b)(3)(ii)(C) of this section or in this paragraph (b)(3)(v). See also paragraph (c) of this section (SRLY limitation).

(2) *Revoking a previous carryback waiver.* A consolidated group may revoke a prior election pursuant to § 1.1502-21(b)(3)(i) to relinquish the entire carryback period with respect to an Applicable CNOL, but only if the group makes the election pursuant to section 172(b)(1)(H) with regard to such Applicable CNOL.

(3) *Pre-acquisition electing member.* If a member (Electing Member) of a consolidated group makes an Extended Carryback Period election pursuant to section 172(b)(1)(H) with regard to a loss from a separate return year ending before the Electing Member's inclusion in a consolidated group, the election will not disqualify the acquiring group from making an otherwise available election pursuant to section 172(b)(1)(H) with regard to an Applicable CNOL incurred in a consolidated return year that includes the Electing Member.

(B) *Taxpayer's taxable income.* For purposes of computing the limitation under section 172(b)(1)(H)(iv) on a Five-Year Carryback to any consolidated return year from any consolidated return year or separate return year, *taxpayer's taxable income* as used in section 172(b)(1)(H)(iv)(I) means consolidated taxable income (CTI) in the consolidated return year that is the fifth taxable year preceding the year of the loss. For purposes of the preceding sentence, CTI is computed without regard to any CNOL deduction attributable to

the particular Five-Year Carryback or any NOL from any member's taxable year ending on the same date as the taxable year in which the Five-Year Carryback arises, or any taxable year thereafter.

(C) *Limitation on Five-Year Carrybacks to a consolidated group—(1) Annual limitation.* The aggregate amount of Five-Year Carrybacks from years ending on the same date (Testing Date) to any consolidated return year may not exceed the excess of 50 percent of the CTI for that year over the total of Five-Year Carrybacks to that consolidated return year from years ending before the Testing Date (Annual Limitation). For purposes of the preceding sentence, CTI is computed without regard to—

(i) Any CNOL deduction attributable to Five-Year Carrybacks to such year; or

(ii) Any NOL from any member's taxable year ending on the Testing Date or any taxable year thereafter.

(2) *Pro rata absorption of limited and non-limited losses.* Any Five-Year Carryback, and other net operating losses, from years ending on the same date that are available to offset CTI in the same year are absorbed on a pro rata basis. See § 1.1502-21(b)(1).

(D) *Election by small business.* This paragraph (b)(3)(v) does not apply to any loss of an eligible small business as defined in section 172(b)(1)(H)(v)(II) with respect to any election made pursuant to section 172(b)(1)(H) as in effect on the day before the date of the enactment of the Worker, Homeownership, and Business Assistance Act of 2009.

(E) *Examples.* The rules of this paragraph (b)(3)(v) are illustrated by the following examples. For purposes of the examples, all affiliated groups file consolidated returns, all corporations are includible corporations that have calendar taxable years, the facts set forth the only relevant corporate activity, and all transactions are with unrelated parties.

Example 1. Computation and Absorption of Five-Year Carrybacks. (i) *Facts.* P is the common parent of the P Group. On June 30, 2006, P acquired all of the stock of T from X, the common parent of the X Group. The X Group has been in existence since 1996. P did not make the election described in § 1.1502-21(b)(3)(ii)(B) to relinquish, with respect to all CNOLs attributable to T, the portion of

the carryback period for which T was a member of the X Group. In 2008, the P Group sustained a \$1,000 CNOL, \$600 of which was attributable to T under § 1.1502-21(b)(2)(iv)(A). P elected a Five-Year Carryback pursuant to section 172(b)(1)(H) with regard to the P Group's 2008 CNOL. P did not make an election pursuant to paragraph (b)(3)(ii)(C) of this section to waive any portion of the period during which T was included in the X Group. T's fifth taxable year preceding the year of the loss was the X Group's 2004 consolidated return year. For 2004, T's separate return limitation year (SRLY) limitation for losses carried into the X Group was \$400. The X Group's CTI for 2004 is \$200. The X Group did not make a Five-Year Carryback election for a CNOL from its 2008 or 2009 taxable year. There are no other NOL carrybacks into the X Group's 2004 consolidated taxable year.

(ii) *Five-Year Carryback from separate return year.* Pursuant to paragraph (b)(3)(v)(C)(I) of this section, the amount of T's apportioned loss that is eligible for Five-Year Carryback is limited to 50 percent of the X Group's CTI for 2004, or \$100 ($\200×50 percent). Therefore, \$100 of T's apportioned loss will be carried into the X Group's 2004 consolidated return year. In addition, T's 2008 loss is subject to the SRLY limitation of \$400 with respect to the X Group. Thus, the amount of T's portion of the P Group's 2008 CNOL that may offset the X Group's 2004 CTI is \$100 (the lesser of \$400 (T's SRLY limitation) or \$100 (the amount of T's Five-Year Carryback)).

(iii) *Pro rata absorption of limited and non-limited losses within a single consolidated return year.* The facts are the same as in paragraph (i), except that the X Group sustained a \$750 CNOL in 2008, which X elected to carry back four years to its 2004 consolidated return year (no Five-Year Carryback). Further, the X Group had CTI of \$500 in 2004. Therefore, the X Group and the P Group both carry back CNOLs from years ending December 31, 2008, although only the P Group's CNOL (including the portion allocable to T) constitutes a Five-Year Carryback. The Annual Limitation on Five-Year Carrybacks will be \$250 ($\500×50 percent), with CTI determined without taking into account the portion of P's 2008 CNOL carried back to the X Group's 2004 consolidated return year or the X Group's 2008 CNOL, which arises from a taxable year ending on the same date as the Five-Year Carryback. The \$750 CNOL carryback within the X Group is subject to no limitation. Under § 1.1502-21(b)(1), because the 2008 CNOL of the X Group and the 2008 SRLY loss of T are losses from years ending on the same date and are available to offset CTI in the same year, the two losses offset the X Group's \$500 CTI on a pro rata basis. Accordingly, \$375 of the X's Group's 2008 CNOL [$\$500 \times \$750/(\$750 + \$250)$] and \$125 of T's portion of the P Group's 2008 CNOL [$\$500 \times$

$\$250/(\$750 + \$250)$] offset the X Group's 2004 CTI.

Example 2. Multiple carryback years. (i) *Facts.* On January 1, 2004, Individual A formed X, which formed corporations S and T, and X elected to file a consolidated Federal income tax return. For its 2004 consolidated taxable year, the X Group's CTI was \$1,100. For its 2005 consolidated taxable year, the X Group's CTI was \$1,000. On June 30, 2007, the X Group sold all of the S stock to the Y Group and sold all of the T stock to the Z Group. The X Group terminated in 2007. Neither Y nor Z made the election described in § 1.1502-21(b)(3)(ii)(B) to relinquish, with respect to all CNOLs attributable to S and T, respectively, the portion of the carryback period for which S and T were members of the X Group. In 2008, the Y Group sustained an \$800 CNOL, \$400 of which was attributable to S under § 1.1502-21(b)(2)(iv)(A). Y elected a Five-Year Carryback with regard to the Y Group's 2008 CNOL pursuant to section 172(b)(1)(H). Y did not make an election pursuant to paragraph (b)(3)(ii)(C) of this section to waive any portion of the period during which S was included in the X Group. In 2009, the Z Group sustained a \$1,000 CNOL, \$600 of which was attributable to T under § 1.1502-21(b)(2)(iv)(A). Z elected a Five-Year Carryback with regard to the Z Group's 2009 CNOL pursuant to section 172(b)(1)(H). Z did not make an election pursuant to paragraph (b)(3)(ii)(C) of this section to waive any portion of the Extended Carryback Period during which T was included in the X Group.

(ii) *Analysis.* The \$400 of Y Group's 2008 CNOL that is apportioned to S is carried back as a separate return year Five-Year Carryback to the X Group's 2004 consolidated return year. The \$600 of Z Group's 2009 CNOL that is apportioned to T is also a separate return year Five-Year Carryback to the X Group's 2005 consolidated return year. The Annual Limitation on Five-Year Carryback to the X Group's 2004 consolidated return year computed under paragraph (b)(3)(v)(C)(I) of this section equals \$550 ($\$1,100$ of CTI $\times 50$ percent). Because S is making the sole Five-Year Carryback to the X Group's 2004 consolidated return year, S will make a Five-Year Carryback of the full \$400. Similarly, the Annual Limitation for Five-Year Carryback to the X Group's 2005 consolidated return year computed under paragraph (b)(3)(v)(C)(I) of this section equals \$500 ($\$1,000$ of CTI $\times 50$ percent). Because T is making the sole Five-Year Carryback to the X Group's 2005 consolidated return year, T will make a Five-Year Carryback of the full \$600. The SRLY limitations for S and T, respectively, may limit the absorption of the Five-Year Carrybacks within the X Group.

Example 3. Pre-acquisition election by T. P is the common parent of the P Group. On December 31, 2008, P acquired all of the stock of T from X, the common parent of the X Group. T had been a member of the X Group since 1999. P did not make the election described in § 1.1502-21(b)(3)(ii)(B) to relinquish, with respect to all CNOLs attributable to T, the portion of the carryback period for which T was a member of the X Group. Pursuant to section 172(b)(1)(H), the X Group elected to make a Five-Year Carryback of its 2008 CNOL back to 2003. A portion of this CNOL is attributable to T pursuant to § 1.1502-21(b)(2)(iv)(A). In 2009, the P Group incurred a CNOL of \$1,000, \$600 of which is attributable to T pursuant to § 1.1502-21(b)(2)(iv)(A). Pursuant to section 172(b)(1)(H), the P Group elected a Five-Year Carryback with regard to its 2009 CNOL. P did not make the election pursuant to paragraph (b)(3)(ii)(C) of this section to waive any portion of the period during which T was included in the X Group. The Five-Year Carryback election by the X Group with respect to its 2008 CNOL (which includes the portion of the CNOL attributable to T) does not disqualify the P Group from electing a Five-Year Carryback with regard to its 2009 CNOL. Therefore, the P Group may carry back its CNOL, including the portion attributable to T, in accordance with § 1.1502-21 and the rules of this section.

(c) through (h)(8) [Reserved] For further guidance, see § 1.1502-21(c) through (h)(8).

(9) *Section 172(b)(1)(H)*—(i) *Applicability date.* This section applies to any consolidated Federal income tax return due (without extensions) after June 23, 2010, if such return was not filed on or before such date. However, a consolidated group may apply this section to any consolidated Federal income tax return that is not described in the preceding sentence.

(ii) *Expiration date.* The applicability of this section will expire on June 21, 2013.

[T.D. 9490, 75 FR 35645, June 23, 2010, as amended at 75 FR 44901, July 30, 2010]

§ 1.1502-22 Consolidated capital gain and loss.

(a) *Capital gain.* The determinations under section 1222, including capital gain net income, net long-term capital gain, and net capital gain, with respect to members during consolidated return years are not made separately. Instead, consolidated amounts are determined for the group as a whole. The consoli-

dated capital gain net income for any consolidated return year is determined by reference to—

(1) The aggregate gains and losses of members from sales or exchanges of capital assets for the year (other than gains and losses to which section 1231 applies);

(2) The consolidated net section 1231 gain for the year (determined under § 1.1502-23); and

(3) The net capital loss carryovers or carrybacks to the year.

(b) *Net capital loss carryovers and carrybacks*—(1) *In general.* The determinations under section 1222, including net capital loss and net short-term capital loss, with respect to members during consolidated return years are not made separately. Instead, consolidated amounts are determined for the group as a whole. Losses included in the consolidated net capital loss may be carried to consolidated return years, and, after apportionment, may be carried to separate return years. The net capital loss carryovers and carrybacks consist of—

(i) Any consolidated net capital losses of the group; and

(ii) Any net capital losses of the members arising in separate return years.

(2) *Carryovers and carrybacks generally.* The net capital loss carryovers and carrybacks to a taxable year are determined under the principles of section 1212 and this section. Thus, losses permitted to be absorbed in a consolidated return year generally are absorbed in the order of the taxable years in which they were sustained, and losses carried from taxable years ending on the same date, and which are available to offset consolidated capital gain net income, generally are absorbed on a pro rata basis. Additional rules provided under the Internal Revenue Code or regulations also apply, as well as the SRLY limitation under paragraph (c) of this section. See, e.g., section 382(1)(2)(B).

(3) *Carryovers and carrybacks of consolidated net capital losses to separate return years.* If any consolidated net capital loss that is attributable to a member may be carried to a separate return year under the principles of § 1.1502-21(b)(2), the amount of the consolidated